(3)

No. 04-81

Supreme Court, U.S.
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In The
Supreme Court of the United States

BASF CORPORATION,

Petitioner,

v.

RONALD PETERSON, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Minnesota

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Minnesota Supreme Court properly affirmed a unanimous jury verdict and held that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) – a health and safety law – does not preempt plaintiffs' "fraudulent marketing" claims where evidence was presented that,

A. defendant BASF Corp. (BASF) engaged in a national "system of deceit" to exploit minor crop farmers by marketing the same herbicide as different products – Poast and Poast Plus – at different prices to extract inflated prices from minor crop farmers,

B. BASF lied to state regulatory authorities, food processors, farmers and dealers to conceal the Environmental Protection Agency (EPA) registration of cheaper Poast Plus for the same crops as Poast, with the same safety data,

C. EPA by its own edict in this case does not regulate fraudulent marketing – *"a company marketing decision in which EPA has no input . . . ,"*

D. BASF threatened, encouraged and allowed the criminal prosecutions of farmers for off-label use of cheaper Poast Plus as a "market[ing] . . . strategy" to "enforce" the use of expensive Poast herbicide on minor crops,

E. BASF considered the *"risk"* of farmers discovering the truth, and whether United States farmers could be *"controlled in future"* if BASF's fraudulent marketing and pricing schemes for Poast and Poast Plus were discovered, and

QUESTIONS PRESENTED – Continued

F. BASF's regulatory and marketing experts and management all conceded during trial that compliance with FIFRA has no bearing on whether a company deceptively and fraudulently markets a herbicide?

II. Whether the First Amendment prohibits consumers from pursuing a fraud claim against a company for "fraudulent marketing techniques" including evidence that the company deceived and lied to state regulatory authorities, food processors, farmers and dealers to conceal the EPA registration of Poast Plus for the same crops as Poast using the same safety data?

RULE 14.1(b) STATEMENT

1. Ronald Peterson
2. Barry Thune
3. Owen Larson
4. Owen Larson Farms, Inc.
5. Duane Evenson
6. Jeffrey Nesvig
7. Richard Moen
8. Christopher Grove
9. Christopher Grove Farms, Inc.
10. David Abentroth
11. Glenn Asbeck
12. Asbeck, Inc.
13. Donald Steinbeisser
14. Joe G. Steinbeisser & Sons, Inc.
15. Stephen Pust
16. Stephen Pust Farms, Inc.
17. All persons who purchased the herbicide Poast between January 1, 1992 and December 31, 1996 for use on their crops, except North Dakota residents who purchased Poast in North Dakota – who settled a separate class action lawsuit with BASF Corporation in 1997 for $3.5 million and national injunctive relief. *See, e.g.*, PX358 (national reduction in price of Poast)
18. BASF Corporation

RULE 29.6 STATEMENT

Class Representatives include Owen Larson Farms, Inc., Christopher Grove Farms, Inc., Asbeck, Inc., Joe G. Steinbeisser & Sons, Inc., and Stephen Pust Farms, Inc. These small family-owned farm corporations, incorporated in the States of Minnesota and Montana, have no parent companies and no publicly-traded stock.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents (Farmers) respectfully ask this Court to deny Petitioner BASF Corporation's (BASF) petition for a writ of certiorari to the Supreme Court of Minnesota as it is meritless.[1]

OPINIONS BELOW

The four state and federal court opinions all approving Farmers' claims are published below at *Peterson v. BASF Corp.*, 675 N.W.2d 57 (Minn. 2004) (*Peterson III*); *Peterson v. BASF Corp.*, 657 N.W.2d 853 (Minn. App. 2003) (*Peterson II*); *Peterson v. BASF Corp.*, 618 N.W.2d 821 (Minn. App. 2000), *rev. denied* (Minn. Jan. 26, 2001) (*Peterson I*); *Peterson v. BASF Corp.*, 12 F.Supp.2d 964 (D. Minn. 1998).

STATEMENT OF THE CASE

This is a straightforward consumer fraud case brought under the New Jersey Consumer Fraud Act, §§ 56:8-1-56:8-116 (NJCFA) on behalf of farmers in all 50 states who purchased Poast herbicide from New Jersey-based BASF[2] in 1992-96, except for some North Dakota farmers who settled a separate class action lawsuit with BASF in 1997 for $3.5 million and national injunctive relief. *See, e.g.*, PX358 (national reduction in price of Poast).[3]

This case has been litigated for almost eight years with four published state and federal court opinions and a unanimous 12-member jury verdict adopted by the trial court

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[1] Eleven Minnesota appellate judges have studied the facts of this case as determined by the jury and unanimously rejected BASF's legal defenses.

[2] BASF is a subsidiary of a global German parent corporation, BASF Aktiengesellschaft (BASF AG), with yearly revenues exceeding $8 billion. The trial court conservatively excluded evidence that BASF and BASF AG were at the epicenter of recent major violations of antitrust and consumer laws (Clerk Doc. No. 493); Minn.R.Evid. 404(b).

[3] PX refers to Plaintiffs' (Farmers) trial exhibits and Tr. refers to trial transcript.

approving Farmers' claims that BASF engaged in a national "system of deceit"– intentional misrepresentations, unconscionable commercial practices, and omissions – by marketing the same herbicide as different products – Poast and Poast Plus – to extract inflated prices from minor crop farmers. *See Peterson III*, 675 N.W.2d at 63-64 ("BASF made material misrepresentations in advertisements ... [and engaged in many other] ... efforts to prevent farmers from learning that Poast Plus was approved for use on the same crops as Poast."); *Peterson II*, 657 N.W.2d at 866 ("jury could conclude that BASF's marketing scheme and exploitation of federal regulations, rather than its lawful use of federal regulations, concealed that Poast and Poast Plus were registered for the same uses and constituted fraud under the NJCFA"); *Peterson I*, 618 N.W.2d 821 (remanding *for a jury to determine* whether BASF's herbicide marketing and pricing schemes deceived farmers and wrongfully exploited the federal EPA and state regulatory process as a *"system of deceit"* to exact inflated prices from minor crop farmers); *Peterson*, 12 F.Supp.2d 964 (remanding to state court).

BASF never confronts extensive evidence of its outright misrepresentations and fraudulent concealment. The Minnesota Supreme Court, *Peterson III*, 675 N.W.2d at 70 (emphasis added), did confront the evidence:

> [F]armers argue that their consumer fraud claim is not based on BASF's labels but rather on fraudulent marketing techniques. The court of appeals agreed. It held that "the farmers' claims were based on BASF's misleading statements and omissions as to the EPA-authorized uses of the products, not on the claims that BASF committed fraud in the labeling or packaging." *Peterson II*, 657 N.W.2d at 865. Further, the court of appeals noted that "the farmers here were not asserting that BASF's registration and container labels were false or misleading, * * * [r]ather, the farmers' point was that *even if BASF's* labels were technically accurate, BASF could and did commit consumer fraud by leading farmers to believe that the cheaper Poast Plus could only be used on major crops ...."

For example, the farmers presented evidence that BASF advertised Poast Plus as only "registered" for use on cotton, soybeans, peanuts, and alfalfa, and advertised that Poast was the "only" post-emergent grass herbicide registered for use on minor crops, *which a BASF executive candidly admitted was a material omission.* Additionally, BASF attempted to prevent word from spreading that Poast Plus was registered for use on minor crops. A BASF sales representative informed authorities that farmers were using Poast Plus on minor crops, BASF had its public relations firm submit a magazine article discussing increased enforcement of fines for failing to follow label recommendations, and BASF told the North Dakota Department of Agriculture that BASF could not add crops on the Poast label to the Poast Plus label because the EPA would require it to do further residue testing, which would cost the company millions of dollars. BASF's alleged unconscionable conduct went beyond the label and the reach of federal law. As an EPA representative stated in correspondence with the North Dakota Commissioner of Agriculture, the "*problem appears to stem from a company marketing decision in which the EPA had no input.*"

A. Summary Of Argument

BASF asks this Court to inappropriately extend preemption and First Amendment principles to shield conduct found by a jury to be based on "an unconscionable commercial practice, deception, fraud, false pretense, false promise" and "a knowing (intentional) omission, suppression or concealment of the truth." BASF's petition is frivolous in the face of unanimous Minnesota appellate rulings, entirely consistent with rulings of all courts across the land, rejecting BASF's arguments that fraudulent marketing schemes are preempted by federal health and safety law or immunized by the First Amendment.

1. This "Fraudulent Marketing" Case Has Nothing To Do With FIFRA Preemption Disputes Involving Injury To People And Crops

Farmers have never challenged the adequacy of the human safety warnings on the Poast and Poast Plus herbicide product labels (failure-to-warn), or the phytotoxicity of the product (crop injury), or the efficacy of the product (whether it works as intended). Nor do Farmers claim that BASF misled the EPA in its registration submissions. Farmers challenge only BASF's "fraudulent marketing" of its herbicide to consumers.

BASF misuses cases that have no relationship to Farmers' fraudulent marketing claims. For example, BASF misuses *Dow Agrosciences LLC v. Bates*, 332 F.3d 323 (5th Cir. 2003), *cert. granted*, 2004 WL 1431958 (U.S. June 28, 2004) (No. 03-388) (whether FIFRA preempts claims of peanut crop damage caused by pesticide), a FIFRA preemption case now before this Court. The "Question Presented" by this Court in granting the *Bates* petition for a writ (emphasis added): "Which, if any, state law ***crop injury claims*** are preempted by the [FIFRA]?" Farmers' claim that BASF fraudulently marketed its herbicide is as far removed from *Bates* – a crop injury case – as the earth is from the moon. Said the Minnesota Supreme Court in *Peterson III*, 675 N.W.2d at 70-71 (emphasis added), in analyzing evidence before the jury:

> As an EPA representative stated in correspondence with the North Dakota Commissioner of Agriculture, the "***problem appears to stem from a company marketing decision in which the EPA had no input***."

Again stated, Farmers challenge only the fraudulent marketing of BASF's herbicide to Farmers. There is absolutely no authority, much less a split in authority, supporting BASF's disregard of the EPA's own statements

in this case,[4] or its claim that Farmers' marketing and advertising fraud claims are preempted by FIFRA. BASF's federal preemption defense is nonsense.

2. First Amendment Never Protects Consumer Fraud

BASF also complains that this Court should extend the First Amendment to bar state regulation of fraudulent marketing schemes. The Minnesota Supreme Court would not even consider BASF's First Amendment argument. *Peterson III,* 675 N.W.2d at 65 (granting review "with the exception of BASF's First Amendment argument"). This Court recently recognized that "fraudulent marketing representations to charitable groups are not protected speech"). *Illinois ex rel. Madigan, Attorney General v. Telemarketing Assoc., Inc.*, 538 U.S. 600 (2003). No authority has ever conflicted with application of the *Madigan* principle to consumers. *See, e.g., Greater New Orleans Broadcasting Assn. v. U.S.*, 527 U.S. 173 (1999) (false, deceptive, or misleading advertising is not protected speech); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980) (commercial speech not protected if intended to mislead); *Friedman v. Rogers*, 440 U.S. 1 (1979) (state can restrict deceptive or misleading commercial speech even if not provably false and partly true); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (even truthful commercial speech can be regulated by consumer fraud statutes); *State v. Leary*, 587 A.2d 85, 91-92 (Conn. 1991) (no First Amendment protection for evidence submitted to prove violation of Connecticut Unfair Trade Practices Act).

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[4] BASF's "ostrich-like" disregard of the EPA's pronouncements is unbecoming. *See, e.g., Mannheim Video, Inc. v. County of Cook*, 884 F.2d 1043, 1047 (7th Cir. 1989) ("ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist is unprofessional"); *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1081 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988) ("ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist" requires Rule 11 sanctions).

B. Unanimous Jury Verdict Fully Adopted By Trial And Unanimous Minnesota Appellate Courts Confirms That BASF Engaged In A National "System Of Deceit" To Extract Inflated Prices From Minor Crop Farmers

BASF's misconduct and deceit arose when BASF's original product, Poast, faced competition in the national soybean (major crop) market. In the minor crop market, Poast had a dominant position. To meet competition in major crops, while retaining a premium price in minor crops, BASF deceptively devised Poast Plus and marketed expensive Poast to minor crop growers and cheaper Poast Plus to major crop growers. It was a market-segmentation scheme.

The EPA and BASF regarded Poast and Poast Plus as the same herbicide and both products were EPA-registered for the same crops based on the same residue safety data submitted to the EPA under oath by BASF. Both products were applied at the same amount of active ingredient per acre. BASF admitted in federal court and at trial that Poast was $4/acre ($32 per gallon of product) more expensive during the class period. *See, e.g., Peterson*, 12 F.Supp.2d at 967.

BASF's marketing misconduct was intentional. BASF deceived and lied to state regulatory authorities, food processors, farmers and dealers, to conceal a federal regulatory action, namely, the EPA registration of Poast Plus for the same crops as Poast, using the same safety data. BASF threatened, encouraged and allowed the criminal prosecutions of farmers for "off-label" use of cheaper Poast Plus as a "marketing strategy." BASF considered the "*risk*" of farmers and authorities discovering the true EPA registration status of Poast and Poast Plus, and whether United States farmers could be "*controlled in future*" if BASF's fraudulent marketing and pricing schemes for Poast and Poast Plus were discovered.

C. Unanimous *Peterson I* Reversed Summary Judgment For BASF And Remanded For Trial

Peterson I, 618 N.W.2d at 824 (emphasis added), rejected BASF's mutating federal preemption/regulatory compliance defense by distinguishing between regulatory compliance and consumer fraud:

> *BASF's registering of one herbicide for use on different crops was specifically permitted by the EPA.* 40 C.F.R. § 152.130(b) (1994). [Farmers] presented evidence, however, to suggest that BASF designed a plan *to conceal the fact that Poast Plus was EPA registered for use on minor crops* and to discourage any off-label use of Poast Plus . . . Thus, [farmers] have shown that a genuine issue of material fact exists as to whether *BASF's system of deceit* falls within the broad protection of the [NJCFA].

D. Minnesota Supreme Court Denies BASF Petition for Review

BASF petitioned the Supreme Court to review the Court of Appeals' *Peterson I* decision. BASF only argued causation defenses rejected by *Peterson I*, and did not petition for further review of its federal preemption/-regulatory compliance defense.[5] The Supreme Court denied BASF's petition.

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[5] BASF arguably waived any right to continue its federal preemption defense after it failed to seek further review on federal preemption before the Minnesota Supreme Court after the Court of Appeals' *Peterson I* ruling. *See, e.g., Bethea v. Levi Strauss & Co.*, 916 F.2d 453, 456-57 (8th Cir. 1990) (applying law-of-the-case doctrine to prevent litigation of issue decided by prior appellate ruling).

E. Unanimous 12-Member Jury Verdict And Common Fund Judgment

On December 6, 2001, 12 jurors unanimously found:

We, the jury in this case, find as a Special Verdict the following facts by way of answers to the following questions submitted to us by the Court:

1. Did Defendant BASF Corporation engage in an unconscionable commercial practice, deception, fraud, false pretense, false promise, or misrepresentation in relation to BASF's marketing and pricing strategies for Poast and Poast Plus herbicides?

   Answer: YES _X_ NO ___

2. Did BASF engage in a knowing omission, suppression or concealment of the truth in relation to BASF's marketing and pricing strategies for Poast and Poast Plus herbicides?

   Answer: YES _X_ NO ___

If you answered "Yes" to any one of Questions 1 and/or 2 above, then answer Question No. 3.

3. Did BASF's conduct or actions as you have found above cause an ascertainable loss to Plaintiffs?

   Answer: YES _X_ NO ___

If you answered Question No. 3 above "Yes", then go to Question No. 4.

4. What, if any, was the monetary value of Plaintiffs' loss caused by BASF's conduct or actions as you found above for the years 1992 to 1996?

   1992 $ 2,000,000
   1993 $ 5,000,000
   1994 $ 3,000,000
   1995 $ 4,000,000
   1996 $ 1,000,000

Clerk Doc.575. On April 2, 2002, the trial court entered a common fund judgment for Farmers. Clerk Doc.637.

F. Unanimous *Peterson II* Affirms Jury Verdict And Judgment

Peterson II, 657 N.W.2d at 853, rejected BASF's 34 appeal issues and affirmed the 12-member jury verdict and judgment.

G. Unanimous *Peterson III* Affirms Jury Verdict And Judgment

In a February 19, 2004 opinion, the Minnesota Supreme Court fully affirmed the jury award and judgment against BASF, stating:

> At trial, the jury was presented with a special verdict form and found by unanimous vote that BASF "engage[d] in an unconscionable commercial practice, deception, fraud, false pretense, false promise, or misrepresentation in relation to BASF's marketing and pricing strategies for Poast and Poast Plus herbicides" and "engage[d] in a knowing omission, suppression or concealment of the truth in relation to BASF's marketing and pricing strategies for Poast and Poast Plus."

Peterson III, 675 N.W.2d at 64.

STATEMENT OF FACTS

A. Poast And Poast Plus Are The Same Herbicide

Poast and Poast Plus are a post-emergence grass herbicide with the same active ingredient (sethoxydim), EPA approved for the same crops, based on the same residue test data, to control the same grasses, with the same applications and pounds of active ingredient per acre. Tr.2424:19-2425:10;2776:12-2777:13. BASF's EPA registration submission certified that Poast Plus was "tolerant" for the same minor crops as Poast. PX244 (field/forage/vegetables/fruits). BASF's Regulatory Affairs Director and its regulatory trial expert both testified that BASF would never EPA-register Poast Plus for minor crops without crop safety clearance studies. Tr.1340:14-18;1343:1-8;2673:6-12. Under the trade

name Vantage, Poast Plus was legally used on hundreds of varieties of minor crops across the country without crop injury (i.e., delicate roses, violets). Tr.3110:9-3117:1.

B. BASF's Scheme: "Opportunistically Exploit" Minor Crop Farmers

BASF's exploitation of minor crop farmers originated at BASF's New Jersey headquarters in 1988. Tr.1:19-25;13:1-25. BASF decided to price Poast at a premium for minor crop farmers and introduce the same herbicide, cheaper Poast Plus, to meet competition in major crops. BASF was concerned that its scheme would be uncovered, PX217 (emphasis added):

> Does it make sense to position Poast on a high price level in high value [minor] crops and introduce a 2nd grasskiller for soybeans, cotton, sugarbeet for example on a lower price level? ***Will the farmer be controlled in future?***

In 1989, at the direction of parent BASF AG, with instructions emanating from New Jersey headquarters, BASF implemented its exploitive United States' "marketing scheme." PX237. BASF's "Confidential" marketing plan for Poast included these predatory elements: "ACTIVE MARKET SEGMENTATION. OPPORTUNISTIC EXPLOITATION OF NON-SOYBEAN MARKET POTENTIAL." PX234 (emphasis in original).

By 1992, BASF had registered Poast Plus with the EPA as safe for use on the same minor crops as Poast. PX244;Tr.2149:8-2150:1;2424:19-2425:10. BASF attested to the EPA that no new residue studies were needed:[6]

> No new residue data is included and is not needed because *the proposed label directions for use in the above listed crops for Poast Plus are* ***identical*** *to those for the registered product Poast Herbicide* (EPA Reg. No. 7969-58) in terms

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[6] A company must demonstrate the relative safety of a herbicide as it relates to people and the environment. 40 C.F.R. § 158.20 (1993).

> of number of applications, pounds of active ingredient per acre, and PHI [preharvest interval].

PX244 (emphasis added); Tr.2684:22-2685:22. Poast and Poast Plus are indistinguishable when used by farmers except that Poast was $4.00/acre ($32.00/gallon) more expensive than Poast Plus. PX285;Tr.1291:11-1294:13; 2174:7-25;2236:1-2238:20.

C. BASF's Exploitation Scheme: Concealment Of Material Facts And Overt Lies

The EPA *and* BASF regarded Poast and Poast Plus as the same herbicide:

> *Any crops currently registered for use on the POAST label can be placed into the POAST PLUS label.* All that is needed is a proposed POAST PLUS label, containing that particular use, to submit to the EPA for approval.

PX336 (emphasis added). BASF concealed from farmers and agriculture officials – and lied when directly confronted – the truth that Poast and Poast Plus were EPA-registered for the same crops. Tr.1876:1-1879:5. BASF's "secret"[7] registration for Poast Plus was a marketing decision. PX336. The motive for the deception is explained in an October 23, 1992 memo from BASF's public relations firm to BASF's marketing division: "***[W]e run the risk of some people knowing*** POAST PLUS is also registered, but not labeled, for [minor crops]." PX41 (emphasis added).

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[7] North Dakota Agriculture Commissioner Sarah Vogel detailed, to the EPA, North Dakota's discovery that BASF had lied about the Poast Plus registration, PX365 (emphasis added):

> On May 18, 1994, I received a letter from Mr. Sanders [of the EPA] stating, '. . . the crops, which appear on the Poast label, were accepted [registered] for use on the Poast Plus label in 1992. Your problem appears to stem from ***a company marketing decision in which the EPA had no input.***' . . . This was the first time that the Department of Agriculture learned about BASF's ***secret*** label.

To conceal the EPA registration of Poast Plus and advance its "Opportunistic Exploitation" scheme, BASF's marketing was blatant lies and half-truths. BASF claimed through advertising materials that Poast was the "only" product with registered residue tolerances for minor crops. Tr.2151:22-2152:8;2172:7-17. BASF's product line catalog deceptively stated: "Poast Plus for postemergence grass control in multiple crops. *Registered* for use on cottons, soybeans, peanuts, alfalfa." PX270 (emphasis added); Tr.445:6-20. BASF executives testified that it was not appropriate to use the term "registered." Tr.2223:6-12;445:8-20;461:7-21. BASF's concealment and lies regarding the EPA's registration of Poast Plus for minor crops was perpetuated through publications, radio spots, ad slicks, bill stuffers, and postcards directed at minor crop farmers:

> ***Sugarbeets***
>
> "Controls more grasses than any other sugar beet herbicide." PX263;264.
>
> ***Dry Beans***
>
> "Poast is the only over-the-top grass herbicide developed for dry beans." PX263;264.
>
> ***Vegetables***
>
> "For grass control in vegetables, Poast herbicide stands alone. No other herbicide, pre or postemergence, controls so many grasses in all these varieties." PX263;264.
>
> ***Potatoes***
>
> "Controls more grasses than any other potato herbicide." PX263;264.
>
> ***Flax and Sunflowers***
>
> *"Poast from BASF is the only postemergence herbicide registered for use in flax and sunflowers."* . . . "Grass control like never before." PX256 (emphasis added). "Poast from BASF is *the only postemergence herbicide registered for use in flax.*" PX263;264 (emphasis added).

These promotional pieces misrepresented and concealed that Poast Plus was registered with the EPA for the

same crops to control the same grasses, based on the same residue safety data submitted for Poast. Tr.2772:17-25. "As far as what the plant sees, they'd see the same amount of active ingredient." Tr.2777:4-5;1567:19-25;1568:1-25;1569:1-9. "Opportunistic Exploitation" of minor crop farmers remained the driving force behind BASF's marketing of Poast. PX247.

BASF's scheme was effective. Class representatives testified they were misled by Poast and Poast Plus advertisements (Tr.1183:25-1185:1-11;1287:9-1288:5;1445:25-1446:3; 1670:11-22) and representations by BASF field representatives at growers' meetings (Tr.1395:25-1396:17;1443:10-1445: 15;1644:18-1645:2;1669:13-1670:10;2169:2-17). Farmers did not understand they had been deceived by BASF until North Dakota and South Dakota uncovered BASF's marketing fraud and allowed farmers to use Poast Plus on minor crops, and commencement of the North Dakota class action. Tr.1292:7-1294:23;1448:24-1449:7;1643:15-1644:17;2172: 9-17;2198:6-24.

D. BASF's Enforcement Scheme: Criminal Prosecution Of Farmers As A "Marketing" Strategy – While Deceiving Farmers, Distributors, Processors And Regulatory Authorities

To exploit minor crop farmers, BASF recognized that it must actively enforce the use of Poast Plus only on major crops. PX247;250. BASF knew that if farmers realized that cheaper Poast Plus was the same herbicide as Poast and EPA registered for the same crops, farmers would question the use of expensive Poast. PX251;Tr.2172:18-24. If BASF could not prevent the use of cheaper Poast Plus on minor crops, it would experience millions of dollars in lost profits on the same sales volume. PX247. BASF recognized that the greatest risk for losing control – ***"will the farmer be controlled?"*** – were areas, like the Red River Valley of Minnesota/North Dakota, where the same farmers grow major and minor crops side-by-side and purchased Poast and Poast Plus. PX247;251.

BASF urged that farmers be criminally prosecuted for "off-label" use of cheaper Poast Plus on minor crops (PX258;Tr.1863:12-21) – not pursuant to the EPA's underlying taxpayer mandate to regulate the safety of herbicides for man and the environment – but criminal prosecution for "off-label" use only pursuant to BASF's "market[ing] . . . strategy" to "enforce" the use of expensive Poast herbicide on minor crops.[8] PX82;300;Tr.2011:16-2012:6;2012:14-2013:21;2022:1-2024:24;2026:3-2033:12.

Acknowledged BASF's registration specialist in a May 11, 1995 internal memorandum: "We already have a registration for POAST PLUS in sunflowers, but we [marketing] have chosen not to include the use in our current label." PX336. Enforcement of BASF's marketing ploy to restrict the Poast Plus label became the means for BASF's enforcement of its "Opportunistic Exploitation" of minor crop farmers. PX333;300;Tr.1863:12-21.

BASF even sent mailings to 5000 food processors and over 3000 dealers under the guise of maintaining the "safety of the food supply" and stewardship. In the mailing, BASF listed the four major crops on the Poast Plus label as its EPA registration (approved "residue tolerances"), while omitting that Poast Plus was EPA-registered with the same "residue tolerances" for the same minor crops as Poast. PX35;249. The fraudulent purpose of these mailings was to enlist food processors and dealers to restrict the use of Poast Plus to only the major crops in order to "***protect the food supply***" and "***avoid residue problems***." *Id.* Yet, BASF had already certified to the EPA that there were no residue or crop safety (tolerance) problems in using Poast Plus on minor crops. Tr.2684:22-2685:22. BASF fraudulently and unconscionably used food processors and dealers to enforce its "Opportunistic Exploitation" of minor crop farmers and conceal the EPA registration of Poast Plus. PX249.

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[8] FIFRA provides the EPA and state agriculture departments with enforcement mechanisms for violations of product labels ("off-label" use), including civil administrative penalties and criminal sanctions and fines. 7 U.S.C. § 136j-m.

To further reinforce the risk of off-label use of Poast Plus, BASF used its public relations firm to ghostwrite an Article disseminated nationally, warning of the risks of "off-label" use while concealing the fact that the article was paid for by BASF. PX253;Tr.1857:13-1858:13. A BASF Position Paper was simultaneously mailed to a wide variety of agencies and processors involved with minor crops that could influence farmers regarding off-label use of Poast Plus. PX252A;394. The Article and Position Paper stressed "hefty fines" for off-label use and the dangers to consumers and the environment (PX252A;253B), even though BASF knew that Poast Plus was EPA approved as safe for use on the same crops as Poast. PX244. To perpetuate its lies regarding the EPA registration of Poast Plus for use on minor crops, the Position Paper falsely stated that Poast was, "[T]he ***only*** postemergence ***product registered*** to control grasses in [minor crops] . . ." PX252A (emphasis added); Tr.3588:15-24.

E. BASF's Deceit Unravels: Farmers And State Officials React When Truth Of EPA Registration Of Poast Plus is Uncovered.

BASF's own sales force predicted that BASF's fraudulent "Opportunistic Exploitation" scheme would fail. PX402 (emphasis added); Tr.2232:3-2233:3:

> One more group can be added to the growing list of people who are not happy with the ***sethoxydim market segmentation scheme*** from BASF. A research agronomist from Pillsbury Green Giant called to discuss quote "the similarity between the two sethoxydim formulations." To him, it was very clear that their company and the food processors in general were being singled out and asked to pay a much higher price for post emergence grass control.

The grim concern of BASF and parent BASF AG at the dawn of the scheme – ***"Will the farmer be controlled in future"*** – proved prescient. PX217. Minor crop farmers began disregarding BASF's container (marketing) label

restricting Poast Plus to major crops. PX251;276;384 (BASF memo describing scheme as "becoming transparent") (emphasis added).

BASF egregiously enacted a strategy to use agriculture departments to perpetuate BASF's "Opportunistic Exploitation" scheme using state agriculture inspectors to "monitor and enforce the use of Poast over Poast Plus" on minor crops. PX333. BASF turned in its own dealers to Agriculture Inspectors for selling Poast Plus to minor crop farmers. PX258. This resulted in "hefty fines" to dealers and farmers despite the fact that EPA approved Poast Plus safe on minor crops. PX258. As prosecutions increased, BASF took the extreme step of lying to state Agriculture Departments regarding EPA registration of Poast Plus. *See, e.g.*, PX74;335. For example, BASF executives lied to the North Dakota Pesticide Control Board ("Control Board") to conceal the EPA registration of Poast Plus for the same crops as Poast. Tr.1876:1-24;1877:20-24;1929:2-18. A BASF memorandum noted the need to "develop a strategy" ***if North Dakota officials had already learned the truth***:

> North Dakota State has indicated that they have requested information from EPA *and may know* by the time of the March 28 meeting that *Poast Plus is also labeled in all these crops and that BASF has chosen not to extend this label to the marketplace*. . . . This will involve some *nebulous argumentation* . . . that EPA could request side-by-side residue work for Poast Plus and Poast.

PX71 (emphasis added).

Minutes of the March 1994 Control Board demonstrate BASF's overt lies:

> *BASF was asked if they could expand the Poast Plus label* [to all minor crops on the Poast label]. *They said they could not* because of economics. When questioned on whether the EPA may allow them to expand the Poast Plus label based on the current residue package submitted on sethoxydim, *BASF did not know*. However, they feared if they put this issue to question with the EPA, *the*

> *EPA may require BASF to do residue testing for the Poast Plus as well.*

PX73 (emphasis added); Tr.1888:25-1889:12. The Control Board wrote the EPA to determine if Poast Plus *could be registered* for use on minor crops. The EPA responded:

> A review of our records indicate that the crops, which appear on the Poast label, were accepted (registered) for use on the Poast Plus label in 1992. Your problem appears to stem from ***a company marketing decision in which EPA has no input.***

PX82 (emphasis added); Tr.1888:25-1890:7. A confidential internal BASF memorandum to BASF management states that the EPA was upset that BASF had deceived the Control Board:

> Mr. Taylor (EPA) told me he did not appreciate getting put in the middle of this issue since ***it is related to a marketing strategy and is not a regulatory matter***. Furthermore, EPA has already granted registration of POAST PLUS in most of the crops for which POAST is labeled, without requiring additional residue data from BASF. Mr. Taylor knows that the statement made to Ms. Vogel and attributed to BASF is ***incorrect***, and ***he is not pleased that BASF misdirected her*** as to where the issue really lies.

PX334 (emphasis added). At trial, a BASF executive, ***admitted that the statements he and another BASF executive made to the Control Board were false***, but that he ***was told*** to make them by senior executive William Wisdom. Tr.458:1-23.

As BASF turned in dealers and farmers for off-label use of Poast Plus, minor crop farmers petitioned regulators for the right to use cheaper Poast Plus. PX396;397. After BASF's lies were uncovered by North and South Dakota authorities, PX261, North and South Dakota issued 7 U.S.C. § 136v(c)(1) (Rule 24(c)) registrations to

use cheaper Poast Plus on minor crops.[9] PX298;129. Although BASF opposed the Rule 24(c) labels, BASF's own trade and lobby organization (American Crop Protection Association) refused to support BASF's opposition. PX291. Commissioner Vogel bluntly responded to BASF's opposition: *"[BASF] has eroded public respect for the registration process."* PX291 (emphasis added).

The EPA rejected BASF's opposition. PX132;Tr.2669:17-2670:20;Tr. 2689:5-9. Minnesota and Montana officials also considered a Rule 24(c) label for Poast Plus after learning that North and South Dakota had done so. PX133;300;313 ("[BASF] believe[s] the state of Minnesota may also have granted a 24(c) registration for Poast Plus for the same uses."). The matter was rendered moot for *Minnesota and all other states* because, after the actions of North and South Dakota and commencement of the *Tompkins* class action in North Dakota, BASF reduced the price of Poast to equal Poast Plus nationwide in 1997 (Clerk Doc. 563):

> C. Price Reduction. After filing of Plaintiffs' lawsuit, in contemplation of the 1997 growing season, BASF Corporation determined unilaterally to effect a nationwide price reduction of the Poast Product, thereby causing the price of Poast to be equivalent to the price of Poast Plus on a per acre basis. Clerk Doc. 563.

F. BASF's Deceit Was Complete

Said a unanimous *Peterson II*, 657 N.W.2d at 862:

> The farmers showed that BASF engaged in an advertising campaign claiming that only Poast was registered with the EPA for minor crops, despite the fact that Poast Plus was EPA-registered for the same minor crops. Other evidence showed

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[9] BASF's reaction to the North and South Dakota 24(c) registrations was predatory and predictable. BASF, through a personal telephone call from Executive William Wisdom, maliciously threatened to personally sue North Dakota Commissioner Vogel. Tr.1758:15-1759:15.

that BASF used mailings to food processors and dealers, an article submitted to *The Sugarbeet Grower* magazine, and a position paper emphasizing the dangers of "off-label" use, despite the fact that Poast Plus had been approved for minor corps. In another strategy, BASF turned in its own dealers to the North Dakota agriculture inspectors for selling Poast Plus to minor-crop farmers in violation of state pesticide laws, leading to criminal prosecutions of dealers and farmers. Further, the farmers introduced evidence to show that BASF personnel lied to the North Dakota Pesticide Control Board to conceal the fact that Poast Plus was EPA-registered for the same crops as Poast. Once the board learned from EPA officials that this was merely a marketing strategy, North Dakota, as well as South Dakota, obtained so-called "rule 24(c)" special local needs registrations with the EPA, allowing their farmers to use Poast Plus on minor crops.

Testified Farmers' FIFRA expert, Dr. Charles Benbrook: "It was, for approximately a five-, six-year period, price gouging." Tr.1939:17. Commissioner Vogel and Jack Peterson, head of pesticide enforcement for North Dakota, bluntly and repeatedly testified that BASF had lied to them: ***"[I] can take hard answers, but don't lie. Just – you don't lie."*** Tr.1878:5-6;1559:16-25;1566:17-25;1567:1;1681:17-25;1682:1-3. BASF's management conceded that BASF's marketing for Poast Plus was misleading (Tr.3588:15-24):

A. (Chris Coombs) (reading from BASF marketing materials) Okay. Poast Plus is registered for use on the following crops only. Cotton, soybeans, peanuts and alfalfa.

Q. ***Stop there. Do you consider it to be a material omission to say that Poast Plus is registered for use on the following crops only, cotton, soybeans, peanuts and alfalfa, when you knew that it was registered on all of the same crops as Poast?***

A. ***Yes, I would consider that.***

ARGUMENT

I. THREE UNANIMOUS MINNESOTA APPELLATE COURTS COMPLETELY REJECTED BASF'S COMPLAINTS THAT CONSUMER MARKETING FRAUD AND UNCONSCIONABLE COMMERCIAL PRACTICES ARE PREEMPTED BY FEDERAL HEALTH AND SAFETY LAW OR IMMUNIZED BY THE FIRST AMENDMENT

A. BASF's Consumer Fraud Is Established

BASF cannot argue established facts. *See, e.g., Hernandez v. New York*, 500 U.S. 352, 366 (1991) ("in the absence of exceptional circumstances, we would defer to the state-court factual findings"); *Graver Mfg. v. Linde Co.*, 336 U.S. 271, 275 (1940) ("[this Court] cannot . . . review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error.").

B. Fraudulent Marketing And Advertising Claims Are Never Preempted

1. EPA Pronounced BASF's Marketing Scheme Was Not Preempted

Peterson I, II and *III* completely rejected BASF's argument that BASF's technical compliance with the EPA and state registration process preempts Farmers' consumer fraud claims under FIFRA. *Peterson III*, 675 N.W.2d at 70; *Peterson II*, 657 N.W.2d at 864-67; *Peterson I*, 618 N.W.2d 821. The EPA itself pronounced BASF's marketing scheme is not EPA regulated: "***Your problem appears to stem from a company marketing decision in which EPA has no input.***" PX82 (emphasis added).[10]

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[10] In *Tompkins*, the North Dakota class action litigating the facts of this case, the U.S. District Court for North Dakota efficiently *dismissed* BASF's federal preemption argument, stating in a July 12, 1996 Order: "This case is not as much about labeling and packaging ***as it is about pricing and marketing.***" Clerk Doc. 77 (emphasis added) (Farmers' Appendix, 1a-2a).

2. EPA's Pronouncement Fully Accords With FIFRA Savings Clause And This Court's Rulings

The EPA registration and product label process for pesticides is intended to *protect the safety of people and the environment* – not deceptive marketing schemes. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984) (Congress enacted the 1972 FIFRA amendments "[b]ecause of mounting public concern about the safety of pesticides and their effect on the environment [and to] *safeguard[ ] the public interest.*") (emphasis added). The EPA does not protect corporate greed or shield companies from state consumer fraud claims. 7 U.S.C. § 136v. (FIFRA savings clause expressly permits state regulation of the sale – marketing and advertising – of pesticides) (emphasis added); Fed. Reg. 1122-25 (Jan. 11, 1989) (preamble to regulations codified at 40 C.F.R. §§ 116.7, 168.22 (*FIFRA does not grant the EPA authority over advertising of herbicides*); *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 613-14 (1991) (FIFRA does not usurp historic State police powers to regulate pesticide sales).

3. BASF's "Opportunistic Exploitation" Of Minor Crop Farmers Was A "Marketing" Decision

As recognized in *Peterson I*, 618 N.W.2d at 824, the EPA permits a company to register an approved set of uses for a single active pesticide ingredient but container label the product sold to consumers for only some and not all of the registered uses. 40 C.F.R. §§ 152.113 and 152.130(b) ("split and subset labeling"). The EPA also allows companies to register alternate brand names for a registered product. FIFRA § 3(e).

The EPA does not ascertain the reasons why companies choose to split or subset label their pesticides, beyond a demonstration that a split or subset label "*would not significantly increase the risk of any unreasonable adverse effect on the environment.*" 40 C.F.R. § 152.113(b) (emphasis added)

(Farmer's Appendix, 1a-2a). Simply stated, the EPA does *not* address company marketing and pricing practices. And the EPA certainly does not address or condone schemes to fraudulently market one herbicide as different products at radically varying prices, to extract inflated prices from targeted segments of the unknowing consumer market. Acknowledged BASF's registration specialist in a May 11, 1995 internal memorandum: "We already have a registration for POAST PLUS in sunflowers, but ***we [marketing] have chosen not to include the use in our current label.***" PX336 (emphasis added). A confidential internal BASF memorandum to BASF management states that the EPA was upset that BASF had deceived the Control Board: "Mr. Taylor told me he did not appreciate getting put in the middle of this issue since ***it is related to a marketing strategy and is not a regulatory matter.***" PX334 (emphasis added). The Minnesota courts succinctly captured the heart of the dispute:

> [F]armers argue that their consumer fraud claim is not based on BASF's labels but rather on fraudulent marketing techniques. The Court of Appeals agreed. It held that "the Farmers' claims were based on BASF's misleading statements and omissions as to the EPA-authorized uses of the products, not on the claims that BASF committed fraud in the labeling or packaging." *Peterson II*, 657 N.W.2d at 865.

Peterson III, 675 N.W.2d at 70.

4. BASF's State Registration "Marketing" Schemes Were Part-And-Parcel Of BASF's National "System Of Deceit"

BASF's state registration strategies for Poast and Poast Plus were a continuum of BASF's "fraudulent marketing" scheme to "opportunistically exploit" and extract an inflated price from minor crop growers nationwide. *Peterson II*, 657 N.W.2d at 867 (jury could conclude that BASF's state registration decisions were part of BASF's national system of deceit); *see, e.g.*, PX117 (BASF

July 3, 1995 internal memorandum discussing BASF's "market strategies" of "differential pricing of the same active ingredient" and the option of BASF foregoing future Poast state registrations in North Dakota – "label off the state of North Dakota" – to punish the state for its actions after uncovering BASF's fraud).

5. BASF's Regulatory And Marketing Experts And Management Conceded At Trial That Regulatory Compliance Has No Relation To Consumer Fraud

During trial, BASF's regulatory and marketing experts and management conceded that the EPA and state herbicide regulatory process has no relation to whether a company deceptively and fraudulently markets and sells a product:

BASF's EPA regulatory expert – Daniel Barolo

Q. And the same thing would be true of ***a company who went through all the process of registering a crop with both the EPA and states, they could still commit consumer fraud***.

A. ***I presume they could.***

Tr.2493:3-5;2493:19-25;2494:1-5.

BASF's marketing expert – Dr. Dale Dahl

Q. That is ***regardless of whether or not your product is registered with either the EPA or the state, because they're separate registrations, a company can still commit consumer fraud by lying about its product; right?***

A. ***Sure.*** Just like a farmer could commit consumer fraud too.

Q. Okay. ***So patents, consumer fraud, doesn't cover it. Registration, consumer fraud doesn't cover it. Differential pricing, consumer fraud doesn't cover it. In***

other words, you're not protected from committing consumer fraud.

A. *Right.*

Tr.3145:1-5;3145:21-25;3146:1-10.

BASF's management – William Wisdom

Q. And *whether the label was proper or not, BASF could still commit consumer fraud; right?*

A. *I suppose so.*

* * *

Q. And *you will agree and tell the jury that the EPA does not concern itself with BASF's marketing practices, does it?*

A. *That's correct.*

Q. *But consumer fraud laws do, don't they?*

A. *Yes, sir.*

Q. *The EPA registration process that we have been talking about does not concern market[ing]; right?*

A. *That's correct.*

Tr.821:11-18;827:17-25.

6. BASF Misuses Cases Involving Injury To People And Crops And Fraud Upon The EPA

Farmers have never challenged the adequacy of the safety warnings on the Poast and Poast Plus herbicide product labels (failure-to-warn), or the phytotoxicity of the product (whether it harms the crop), or the efficacy of the product (whether it works as intended). Nor do Farmers claim that BASF misled the EPA in its registration submissions. Farmers challenge only BASF's fraudulent marketing of Poast/Poast Plus. BASF misuses cases that have no relationship to farmers' fraudulent marketing claims:

Failure-To-Warn Cases

- *Netland v. Hess & Clark, Inc.*, 284 F.3d 895 (8th Cir.), *cert. denied*, 537 U.S. 949 (2002) (injury to horse rider caused by use of insecticide on horse);
- *Lewis v. American Cyanamid Co.*, 715 A.2d 967 (N.J. 1998) (injury to homeowner caused by insecticide foggers);
- *Grenier v. Vt. Log Bldgs., Inc.*, 96 F.3d 559 (1st Cir. 1996) (injury to homeowner caused by use of pesticide to preserve wood);
- *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993) (injury to workers caused by pesticide);

Phytotoxicity Cases

- *Dow Agrosciences LLC v. Bates*, 332 F.3d 323 (5th Cir. 2003), *cert. granted*, 2004 WL 1431958 (U.S. June 28, 2004) (No. 03-388) (injury to peanut crop caused by herbicide);
- *Etcheverry v. Tri-Ag Serv., Inc.*, 93 Cal. Rptr. 2d 36 (Cal. 2000) (injury to walnut crop caused by insecticide);
- *Kuiper v. Am. Cyanamid Co.*, 131 F.3d 656 (7th Cir. 1997) (injury to corn crop caused by herbicide);
- *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995) (injury to cotton crop caused by herbicide);
- *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993) (injury to corn crop caused by herbicide);
- *Mortellite v. Novartis Crop Protection, Inc.*, 278 F.Supp.2d 390 (D.N.J. 2003) (injury to blueberry crop caused by herbicide);
- *Dahlman Farms, Inc. v. FMC Corp.*, 240 F.Supp.2d 1012 (D.Minn. 2002) (injury to corn crop caused by herbicide);

Fraud On EPA Cases

- *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001) (fraud by company in registration submissions to EPA);
- *Nathan Kimmel, Inc. v. DowElanco*, 275 F.3d 1100 (9th Cir. 2002) (fraud by company in registration submissions to EPA).

BASF's misused cases were easily addressed by the Minnesota appellate courts and do not present any reason for this Court to grant certiorari. *Peterson III*, 675 N.W.2d at 70 (consumer fraud claims based on "fraudulent marketing techniques" rather than label representations are not preempted); *Peterson II*, 657 N.W.2d at 865 (emphasis in original) ("*even if* BASF's labels were technically accurate, BASF could and did commit consumer fraud by leading farmers to believe that the cheaper Poast Plus could only be used on major crops, when, in fact, it was EPA-registered for both major and minor crops.").

C. First Amendment Never Protects Consumer Fraud

BASF isolates and disingenuously argues a bit of evidence in its "system of deceit" as protected by the First Amendment. *Peterson I*, 618 N.W.2d 821 ("*system of deceit*" to exact inflated prices from minor crop farmers). This case, a marketing fraud case with victimized consumers, is radically different from the use a consumer fraud statute by an ideologue with no personal injury to engage a *public policy* debate, an issue raised but not decided in *Nike v. Kasky*, 539 U.S. 654 (2003).

1. BASF Engaged In A "System Of Deceit"

BASF purports the judgment below "rests on a holding that petitioner's truthful speech was 'unconscionable.'"[11] Pet.

[11] "*Unconscionable*" has been defined in identical fashion by the New Jersey (NJCFA) and United States Supreme Courts. *See, e.g., D'Ercole Sales. Inc. v. Fruehauf*, 501 A.2d 990, 1000 n. 3 (N.J. Super.

(Continued on following page)

23. BASF distorts the record. The Minnesota Supreme Court observed there was evidence before the jury of "material [marketing] misrepresentations" and "less than candid responses" regarding the registration status of BASF's products. *Peterson III*, 675 N.W.2d at 70. The jury returned a special verdict finding that BASF had engaged in "deception, fraud, false pretense, false promise, or misrepresentation in relation to BASF's marketing and pricing strategies" and a "*knowing* omission, suppression or concealment of the truth" as part of its marketing scheme.[12] Clerk Doc. 575 (emphasis added). When the truth came out, enforcement officials were outraged, Tr. 1573-74;1829-1830;1878, and BASF's entire marketing scheme unraveled.

Malicious commercial deceit is never protected by the First Amendment. *Illinois ex rel. Madigan, Attorney General*, 538 U.S. 600; *Greater New Orleans Broadcasting Assn.*, 527 U.S. 173; *Central Hudson Gas & Elec. Corp.*, 447 U.S. 557; *Friedman*, 440 U.S. 1; *Lorillard Tobacco Co.*, 533 U.S. 525. It is no wonder that the Minnesota Supreme Court would not even hear BASF's indecent First Amendment claim.

2. BASF Deceived And Lied To State Regulatory Authorities, Food Processors, Farmers And Dealers While Threatening Criminal Prosecutions Of Farmers For Off-Label Use Of Cheaper Poast Plus As A "Market[ing] . . . Strategy" To "Enforce" The Use Of Expensive Poast Herbicide On Minor Crops

BASF complains its reports of off-label pesticide use to regulatory officials to maliciously "enforce" its "opportunistic

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1985) (defining unconscionable commercial practices pursuant to *Federal Trade Commission v. Sperry & Hutchinson*, 405 U.S. 233, 244 (1972), as practices contrary to public policy, or immoral, unethical, oppressive, or unscrupulous).

[12] BASF's petition only acknowledges a finding of "unconscionable commercial practice" and not the jury's findings of intentional acts of fraud.

exploitation" scheme can't support its liability.[13] Whatever protection the First Amendment might provide to corporate efforts to suborn government aid to enforce a fraudulent market segmentation scheme, surely that protection cannot cover intentional misrepresentations to a government agency to perpetrate the "system of deceit." The evidence is compelling: BASF deceived and lied to state regulatory officials, food processors, farmers and dealers. Testified North Dakota Agriculture Commissioner Vogel:

> A. That's right. I mean, there's like a – *just a number of lies [by BASF]* and in the meantime we had been out in good faith prosecuting – prosecuting farmers, using state police power to – *prosecuting farmers for doing things that were in fact legal and that the company knew all along was legal. And I felt very much that we had been duped.*

Tr. at 1559:16-251;1566:17-25;1567:1.

BASF appeared before the Control Board in 1995 with its "nebulous argumentation" strategy – lies – that Poast Plus was not registered for minor crop use and that the EPA would require expensive residue testing. The Control Board later learned the truth from the EPA, that less expensive Poast Plus had been registered for the same minor crops as Poast by the EPA in 1992, based on "the same residue testing." The EPA registration manager for

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[13] BASF cites cases applying the *Noerr-Pennington* doctrine. *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (effort to exercise government power, even to gain an anti-competitive advantage, generally does not create liability under antitrust laws). The *Noerr-Pennington* doctrine, based on statutory considerations, is broader than any constitutional protection for communications to government. *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 384 (1991) (defendant's conduct immune from antitrust liability under *Noerr-Pennington* but remanded for consideration on merits of state law claim). BASF's reliance on this antitrust doctrine – inapplicable to this consumer fraud case – illustrates there is no First Amendment protection for intentional corporate misrepresentations to state regulatory officials and consumers to enforce a fraudulent marketing scheme. *See, e.g., Illinois ex rel. Madigan*, 538 U.S. at 612 ("[l]ike other forms of public deception, fraudulent charitable solicitation is unprotected speech.").

Poast/Poast Plus informed BASF he was "***not pleased that BASF misdirected***" North Dakota officials.

Peterson II properly rejected BASF's argument that its ghostwritten magazine article and testimony about the reports to law enforcement should have been excluded from evidence. *Peterson II*, 657 N.W.2d at 871-73. This evidence was entirely relevant as part of the proof of BASF's "system of deceit." *Leary*, 587 A.2d at 91-92 (no First Amendment protection for evidence submitted to prove violation of Connecticut Unfair Trade Practices Act). Despite BASF's repugnant claim that the lower courts committed "an egregious and inexplicable" constitutional error, Pet. 27, BASF never claims the decision creates a conflict with other state court or federal circuit rulings. All courts agree that the First Amendment offers no shield to fraudulent and immoral marketing schemes.

3. Unlike *Nike*, This Case Does Not Present Use Of A Consumer Fraud Statute By An Ideological Citizen With No Personal Injury To Engage A *Public Policy* Debate

In *Nike*, a plaintiff filed suit under a state deceptive practices statute alleging the corporate defendant made misleading statements in the media about its overseas labor practices. The complaint acknowledged these statements did not personally harm the plaintiff. *Nike*, 539 U.S. at 656. The statements concerned matters "of [public policy]" in which the "participants advocated, or opposed, public collective action." *Id.* at 677. There was concern about the arguable unique use of a state fraud statute with no direct injury by the plaintiff to affect a public policy debate unrelated to sale of the defendant's product. *Id.* at 679 (Breyer, J., dissenting) ("purely ideological plaintiff").

One can hardly imagine a case further removed from *Nike* than this consumer fraud case. BASF's deceptions did not engage a public debate about regulatory policy. The plaintiffs here are not ideological with no direct harm. They are at the opposite end of the spectrum: Farmers who were defrauded of millions of dollars by BASF's cunning "system of deceit." Any suggestion that this case even remotely raises First Amendment concerns is facetious.

CONCLUSION

BASF's "system of deceit" was addressed by the Fargo (ND) *Forum* editors in a 1996 newspaper editorial, after BASF's Poast/Poast Plus marketing deceit was uncovered by the North Dakota Department of Agriculture:

> Shame on chemical company. . . . Its not just the money. BASF has been caught with their pants down. They have seriously undermined farmer confidence in the ***honesty*** of chemical companies and the ***integrity of safety rules***. Shame on them.

Clerk Doc. No. 562 (emphasis added).

BASF's petition is frivolous. Victimized Farmers are dying, retiring and losing their ability to prove a claim from the long-ago class period of 1992-96, while BASF exercises this last-gasp effort to delay payment of the money judgment. The petition should be promptly denied.

Respectfully submitted,

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40 C.F.R. § 152.113 Approval of registration under FIFRA sec. 3(c)(7) – Products that do not contain a new active ingredient.

(a) Except as provided in paragraph (b) of this section, the Agency may approve an application for registration or amended registration of a pesticide product, each of whose active ingredients is contained in one or more other registered peticide [sic] products, only if the Agency has determined that:

(1) It possesses all data necessary to make the determinations required by FIFRA sec. 3(c)(7)(A) or (B) with respect to the pesticide product which is the subject of the application (including, at a minimum, data needed to characterize any incremental risk that would result from approval of the application);

(2) Approval of the application would not significantly increase the risk of any unreasonable adverse effect on the environment; and

(3) The criteria of § 152.112(a), (d), and (f) through (h) have been satisfied.

(b) Notwithstanding the provisions of paragraph (a) of this section, the Agency will not approve the conditional registration of any pesticide under FIFRA sec. 3(c)(7)(A) unless the Agency has determined that the applicant's product and its proposed use are identical or substantially similar to a currently registered pesticide and use, or that the pesticide and its proposed use differ only in ways that would not significantly increase the risk of unreasonable adverse effects on the environment.

(c) Notwithstanding the provisions of paragraph (a) of this section, the Agency will not approve the conditional

registration of any pesticide product for a new use under FIFRA sec. 3(c)(7)(B) if:

(1) The pesticide is the subject of a special review, based on the use of the product that results in human dietary exposure; and

(2) The proposed new use involves use on a major food or feed crop, or involves use on a minor food or feed crop for which there is available an effective alternative registered pesticide which does not meet the risk criteria associated with human dietary exposure. The determination of available and effective alternatives shall be made with the concurrence of the Secretary of Agriculture.